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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1981

RONALD G. BLACK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals For the Seventh Circuit

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QUESTION PRESENTED

WHETHER A SEIZURE OF THE DEFENDANT OCCURED WHEN UNDERCOVER POLICE OFFICERS SURROUNDED HIM AND TOOK AND KEPT HIS DRIVER'S LICENSE AND PLANE TICKET DURING THEIR INTERROGATION AND SEARCH OF HIS LUGGAGE.

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The Petitioner, RONALD G. BLACK, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the proceeding on April 6, 1982.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at *United States v. Black*, case no. 81-1883 (7th Cir. decided April 6, 1982).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on April 6, 1982. The petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment IV, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seziures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

At noon, on May 14, 1980, Officers Burzinski, Kinsella, and Boyle, of the Chicago Police Department, Narcotics Division, were at gate F-2 of the United Airlines terminal at O'Hare Airport, Chicago. The three officers were awaiting an incoming flight from Ft. Lauderdale, Florida (TR. 7). Officer Boyle left the area and played no further part in this case.

The first passenger to leave the aircraft was the Petitioner. He came down the jetway ". . . walking at a rapid pace . . . he appeared to be disoriented and . . . he was swearing a little, and also looking around the concourse." (TR. 8).

"After he stepped out of the jetway, he stepped into the waiting area and rapidly walked through that island to the concourse." (TR. 8).

"As he stepped out onto the concourse, he appeared disoriented and was looking in all directions up and down the concourse and at several people who were standing there waiting for the flight." (TR. 47). The Petitioner stood there for less than a minute (TR. 47). Then he walked down the concourse towards the United screen (TR. 80). The officers followed approximately 15 feet behind him, as the Petitioner went towards a television monitor screen at the junction of F and D concourse (TR. 48).

"He stood at the screen for approximately thirty seconds and then he stood in the area of the screen for several more minutes, looking up and down the concourse . . . he appeared fairly normal at this point

(TR. 49). He then walked approximately fifty feet over to Gate F-3. He walked to the rear of the waiting area where there were several other people seated and took his seat in the area. After he sat down in a chair, he looked all around for approximately three or four mintues just sitting there looking back and forth up and down the waiting area in the concourse. He then slumped lower in his seat and looked for another minute or two. He sat there for a total of about five minutes." (TR. 50). The flight leaving from this gate was United Airlines flight number 3 which is a non-stop flight to Honolulu (TR. 12). The Petitioner was booked on the United flight for Honolulu but had arrived over one hour before departure time. (TR. 76).

Still in the United Airlines waiting area, the Petitioner got up to go to the bathroom. At this time he was confronted by the two police officers. (TR. 77).

Officer Burzinski and Kinsella, casually dressed in blue jeans, showed the Petitioner their identification and stated they were Chicago police officers (TR. 13). Officer Kinsella asked the Petitioner if he could talk with her. The Petitioner said, "Sure."

Officer Kinsella then asked the Petitioner for his identification and airline ticket (TR. 14, 52). The Petitioner removed his wallet from his pocket and took out a Hawaiian drivers license which he handed to Officer Kinsella. He also gave Officer Kinsella his United Airlines ticket (TR. 52). The ticket was in the name of Ronald "Plack" and the drivers license was in the name of Ronald "Black" (TR. 53). Officer Kinsella asked the Petitioner why he was flying under a fictitious name. Officer Kinsella testified that the Petitioner gave no response. "He just shrugged his shoulders." (TR. 53).

The Petitioner testified, "Yes, they asked why there was a discrepancy with the names and I told him I had ordered the tickets over the phone, and I didn't notice it when I picked up the ticket." (TR. 77).

Officer Kinsella gave the airline ticket to Officer Burzinski. She kept the Petitioner's drivers license and airline ticket[1] and they remained in her hands at all times, even subsequent to the arrest (TR. 41, 42). It was at this point that the Petitioner began "shaking, visibly shaking, and acting very nervous." (TR. 15).

Officer Kinsella continued to question the Petitioner as to what he'd been doing in Florida. The Petitioner stated that he'd been in Florida surfing, and that in order to earn money for a return trip he had worked harvesting coconuts (TR. 53).

At that point, Officer Kinsella asked the Petitioner to step aside and he was ushered over to the wall. The officers began to question the Petitioner about what he was carrying in his travel bag and made their initial request to seach his bag. At this point, the Petitioner had been herded against the wall with the officers holding his plane ticket, his drivers license, and physically standing so as to prevent his exit (TR. 32, 33, 78). Petitioner testified that at this point he had his back to the wall. The officers never told him that he did not have to talk to them or that he could leave (TR. 34, 78). This fact was confirmed by Officer Kinsella's testimony (TR. 66).

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[1]Kinsella gave Burzinski the ticket and drivers license in full view of the Petitioner so that he necessarily understood that they would not be returned to him until after the questioning by the officers.

The Petitioner unzipped his travel bag and the officers, after first examining some items, searched it thoroughly (TR. 80). Although the Petitioner at one point told them, "That's enough. I don't want you to search my bag any further." (TR. 80), the search continued and Officer Kinsella told the Petitioner, "You're under arrest," (TR. 80, 81). The search revealed a package containing cocaine.

The Petitioner was charged in a one-count indictment with violating 21 U.S.C., §841(a)(1) by knowingly and intentionally possessing, with the intent to distribute, approximately 540 grams of a mixture containing cocaine.

Prior to trial, the Petitioner moved the district court to suppress all evidence obtained by the Government as a result of a warrantless search and seizure which took place on May 14, 1980 at the Chicago O'Hare Airport. On May 13, 1981 the Honorable Nicholas J. Bua, Judge United States District Court, held a hearing for the Petitioner's Motion to Suppress. At the close of the hearing, the Court orally denied the motion to suppress. On the same day, the Petitioner filed a waiver of jury trial. A bench trial was held on April 2, 1981. The parties stipulated to the evidence heard on the Motion to Suppress. A judgment of guilty was entered on April 9, 1981 and on May 22, 1981 the Petitioner was sentenced under the Youth Correction Act. Imposition of sentence was suspended and the Petitioner was placed on probation for a period of five years.

The United States Court of Appeals for the Seventh Circuit affirmed the Petitioner's conviction on April 6, 1982.

REASON FOR GRANTING THE PETITION

THE DECISION OF THE CIRCUIT COURT BELOW WHICH DETERMINED THAT NO FOURTH AMENDMENT SEIZURE OF THE PETITIONER OCCURRED WHEN THE OFFICERS OBTAINED AND RETAINED HIS DRIVERS LICENSE AND PLANE TICKET IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS REFLECTING A PARTICULAR NEED FOR A UNIFORM STANDARD.

In 1980 Justice Stewart wrote that a seizure occurs when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544 (1980). This case, simply stated, raises the question of whether the Petitioner was seized at the time the Government agents retained his drivers license and plane ticket and that a reasonable person would not have believed he was free to leave.

This petition raises a question presently being considered by the Court in the case of *Royer v. State*, 389 So.2d 1007 (Fla. 3rd DCA en banc, 1980), cert. granted, 30 CrL 4109 (1981). In *Royer* a Florida appellate court considered facts similar to the ones in the instant case and found that an unlawful seizure of the person

had occurred and thereby tainted a subsequent consent.[2] *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963).

The federal appellate courts have wrestled the question of when a seizure occurs and have thus far produced a divergence of opinions. The Fifth Circuit, in noting this problem stated that

> "[h]aving found no Supreme Court ruling that provides definitive guidance in our examination of whether the stop of appellants invoked the Fourth Amendment, we turn to our own cases. There also, however, though establishing a clearer line of precedence than we have gleaned from the Supreme Court's pronouncements, form a confusing thicket of opinions through which we can wend no unobstructed path."
>
> *United States v. Berry*, 670 F.2d 583, 593 (5th Cir. 1982).

The Fifth Circuit then made an attempt to clarify and re-evaluate its own position "concerning the interplay of airport stops and the Fourth Amendment." Id. at 594. It concluded that

> "although we hold that all airport stops need not be seizures, we take care to note that we

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[2]The essence of *Royer v. State* was stated by Judge Barkdull in his concurring opinion. "I concur in the opinion authored by Judge Schwartz as it relates to the invalid consent to search only because of the failure of the law enforcement officers to *return the tickets* and their failure to advise Royer that he had a right to decline the search if he desired." Id. at 1026. (Emphasis added).

hold only with regard to the very narrow range of stops conducted in an appropriate manner. The balance that we find between the interest of the government and the intrusion on the individual is extremely delicate. It tips in favor of holding that a seizure has occurred if there is an intrusion on the individual by law enforcement authorities that is greater than we outlined above."[3] Id. at 595.

The Fifth Circuit, relying on *Mendenhall*, recognized the uniqueness of air travelers by stating:

> "the nervousness that air flight often engenders, the need to quickly make connections for continuing one's journey, the mere surprise from being accosted in a crowded airport concourse by a law enforcement officer for no apparent reason, and the pressure to cooperate with the police to avoid an untoward scene before the crowds of people, all make it easy for implicit threats or subtle coercion to exert a tremendous pressure on an individual to acquiesce to the officer's wishes. In such situations it would be easy to misinterpret acquiescence to an officer's demands as consent; acquiescence cannot, of course, substitute for free consent." *Bumper v. North Carolina*, 391 U.S. 543 (1968).

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[3]It had earlier noted that airport stops of individuals by police, if of an extremely restrictive scope and conducted in a completely non-coercive manner, do not invoke the Fourth Amendment.

The Fifth Circuit concluded that in looking at a totality of circumstances in an airport stop, a court should closely scrutinize whether those circumstances reveal the presence of any coercion. "If such coercion was present, the court must hold that a reasonable person would believe that his freedom had been limited." Id. at 597.

Among the factors that the Fifth Circuit listed in which a court "should place great weight in evaluating the totality of the circumstances involving a stop" it included the "implicit constraints on an individual's freedom as would be caused by retaining an individual's ticket for more than a minimal amount of time . . ." Id. at 597. In *Berry* the Fifth Circuit found that there had been no seizure *until* Berry "complied with the request, showed Marconi his drivers license . . ." Id. at 653. Unlike the instant case, at this time the officers already had reasonable suspicion to support the limited intrusion caused by this stop.

The Seventh Circuit's opinion in the instant case is divergent with that of the Fifth Circuit in that they concluded that a seizure of the Petitioner did not occur when Government agents took and retained both the Petitioner's drivers license and plane ticket, or even when "Kinsella suggested they move to the side of the concourse . . ." *United States v. Black*, (Appendix, A. p. 11) Though the Seventh Circuit recognized that "the retaining may constitute a 'watershed point' in the seizure question", they failed to find that a seizure had occurred in the instant case until much later. Counter to Fifth and Eleventh Circuit opinions, the Seventh Circuit has moved the point of seizure forward in time and circumstance, allowing a person to be detained for a period after the agents obtain his drivers license and

plane ticket so that they may obtain additional information on which to base an articulable suspicion. Id. at p. 14.

A clear divergence of opinion between the circuits is illustrated by the Eleventh Circuit's holding in *United States v. Elsoffer*, case no. 80-7236 (11th Cir., filed April 1, 1982) "that a seizure occurred when Agent Matheson retained the ticket while asking for further identification." In *Elsoffer* the Eleventh Circuit found that "[t]he bulge of unusual size and shape that Matheson observed on Elsoffer's body provide a sufficient specific and articulable basis for justifying the seizure." Id. at 720. This bulge was seen prior to the stop. In the instant case, at the time the Government agents retained the Petitioner's drivers license and airline ticket the Seventh Circuit found the agents did not have sufficient facts to form a reasonable suspicion as it was not until they asked additional questions concerning the Petitioner's recent past that they obtained sufficient additional information with which to justify a seizure. If this Court adapts the Fifth or Eleventh Circuit standard, the seizure of the Petitioner occurred prior to his responding to these questions, and prior to the agents obtaining sufficient articulable suspicion to justify the seizure.

Without a clear Supreme Court ruling which "provides definitive guidance in our examination of whether the stop of appellants invoked the Fourth Amendment", *United States v. Berry*, 670 F.2d 583, 593 (5th Cir. 1982), a divergence of opinion between the circuits will continue to result. This case, like the case of *Royer v. State*, 389 So.2d 1007 (Fla. 3rd DCA en banc, 1980), cert. denied 30 CrL 4109 (1981), provides the vehicle by which this Court may formulate a clear and concise standard to guide the lower courts in considering this important constitutional issue.

CONCLUSION

For the reasons stated, the Petitioner prays this Court issue a Writ of Certiorari.

Respectfully submitted,

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Appendix

Appendix A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1883

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD G. BLACK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 CR 295—Nicholas J. Bua, *Judge.*

ARGUED NOVEMBER 13, 1981—DECIDED APRIL 6, 1982

Before SWYGERT, *Senior Circuit Judge,* PELL, *Circuit Judge,* and GRANT, *Senior District Judge.**

PELL, *Circuit Judge.* The defendant-appellant Ronald Black was charged with possession with intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1). The defendant moved to suppress the introduction of the cocaine as evidence against him on the ground that

*Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

it had been obtained from him through an unlawful search and seizure by Chicago Police Department Officers. The district court denied the motion, and the defendant was convicted following a trial on stipulated testimony. The defendant appeals on the ground that the trial court erred in not granting his motion to suppress. The defendant contends first, that he was seized within the meaning of the Fourth Amendment; second, that the seizure was unreasonable; and third, that he withdrew his consent to a search of his luggage before cocaine was discovered by the arresting officers.

I.

The testimony of the defendant and the two police officers at the hearing on the motion to suppress established how the police had obtained the evidence. Although the thorough opinion of the district court, set out at 510 F. Supp. 989 (N.D. Ill. 1981), lays out the facts in detail, we repeat them here at some length because the resolution of cases of this type is heavily dependent on their particular facts. On May 14, 1980, Chicago Police Officers Burzinski and Kinsella were engaged in surveillance of flights arriving at Chicago's O'Hare Airport from the Miami-Fort Lauderdale area. The officers had been assigned to assist the Drug Enforcement Agency (DEA) in conducting narcotics investigations at the airport. Because the DEA has determined that the southern Florida area is the main source of cocaine distribution in the United States, police officers were trying to monitor as many flights as possible arriving from that area.

Burzinski, a Chicago Police Officer for eight years, had been assigned to narcotics investigations for eighteen

months at the time of the trial, and had been on the O'Hare detail for two months at the time of the defendant's arrest. Prior to Black's arrest, she had participated in approximately fifty stops and ten seizures of narcotics at the airport. Kinsella, a Chicago Police Officer for seventeen years, had been engaged in narcotics investigations for nine years at the time of the trial, and had been assigned to O'Hare for one year full-time, and two years part-time, prior to the defendant's arrest. Kinsella has participated in over a thousand seizures of narcotics, including approximately fifty seizures of narcotics at O'Hare, and seventy-five investigatory stops there of suspected drug couriers.

At around noon on May 14, the officers were monitoring United Airlines Flight 965 from Fort Lauderdale. The first passenger to disembark was the defendant. The officers observed his leaving the jetway alone, walking rapidly or jogging to the waiting area of the gate. The defendant, who was carrying a black Continental Airlines travel bag, appeared to both officers to be disoriented. As he reached the concourse, he stopped to look around, and after several minutes proceeded down the concourse in the direction of the terminal. Kinsella determined, based on the defendant's apparent nervousness, disorientation, and rapid exit from the plane, that it would be appropriate to follow the defendant.

Black walked slowly down the concourse. He appeared to be unsure of his footing, and stumbled at least once. The officers followed Black to the intersection of the F and E concourses where Black viewed a United information television monitor screen for thirty seconds or so. Black then surveyed the area, looking continually

around and behind him for several minutes, in a manner that suggested to Burzinski that he was not looking for anyone or anything in particular, but rather was surveying the people in the area. Black then proceeded, with the officers still following, to Gate F-3. It was then about 12:15 p.m. The next scheduled flight was a 1:15 p.m. non-stop flight to Honolulu. The check-in counter was open, and passengers were checking in for the Honolulu flight. The defendant entered the waiting area without checking in, and sat down. The officers noted that Black continued to scan the waiting area and concourse while seated.

After remaining seated for some five minutes, the defendant picked up his bag and walked into the concourse. As he reentered the concourse, the two officers, who had been standing in the concourse just outside the waiting area, approached him. Neither officer was in uniform. They identified themselves as Chicago Police Officers by showing their badges and I.D. cards, and Kinsella asked Black in "an average everyday" tone of voice if he could talk to him for a moment. The defendant responded, "Sure."

Kinsella then asked Black if he had identification and an airline ticket. Black, who now appeared very nervous and visibly shaken, presented a Hawaii driver's license and a first-class one-way ticket to Honolulu. The ticket was in the name of R. Plack, and had been purchased for cash at a travel agency in Hollywood, Florida. Kinsella asked Black why he was traveling under a fictitious name. Black offered no explanation, but merely shrugged his shoulders in response. Kinsella then asked what Black had been doing in Florida. Black responded that he had gone to Florida three months

earlier to go surfing, had run out of money, and had worked picking coconuts to earn money for his return ticket to Hawaii.

At about this point, Kinsella suggested the group step to the side of the concourse to avoid blocking traffic, and the three of them moved a few feet away from the area of the initial encounter. Kinsella then asked Black what was in the travel bag. Black said it contained books, clothes, and toilet articles. Kinsella asked if Black would consent to a search of the bag. Black said yes. Kinsella informed Black that he need not consent to the search of the bag. Without responding further, Black immediately knelt down, unzipped the bag, took out a book and handed it to Kinsella. At about this time Kinsella handed Black's license and ticket to Burzinski. Kinsella inspected the book, placed it on the floor next to the bag, and took out a shaving kit. He opened the kit, inspected its contents, and placed it on the floor next to the bag.

Kinsella then reached again into the bag, and grasped a shirt. As he did so, he could feel a harder object through the shirt. As he began to withdraw the shirt, Burzinski, who was standing across from Kinsella as he knelt beside the bag, could see a clear plastic bag containing a white powder inside a torn paper bag, wrapped in the shirt. As Kinsella's hand, holding the shirt, reached the top of the travel bag, Black grabbed Kinsella's wrist, and while pulling Kinsella's hand out of the bag, told Kinsella not to search any further. As Black pulled Kinsella's hand free of the travel bag, the plastic bag fell out of the shirt to the bottom of the travel bag. Kinsella saw the plastic bag containing

white powder in plain view at the bottom of the travel bag. At that point, Kinsella placed Black under arrest.

At no time during the entire incident, which lasted no more than a few minutes, did the officers display their weapons or raise their voices. The entire incident took place in a well-lit and spacious public concourse with other travelers present.

Based on the above evidence, the trial court denied the motion to suppress. The court first determined that the officers' initial request to speak to Black did not constitute a seizure under the standard of *United States v. Mendenhall*, 446 U.S. 544, 552-54 (1980), and *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The court noted that the officers merely identified themselves in a conversational tone as Black walked past, and asked if they could speak with him. The court concluded, in light of all the circumstances surrounding the initial contact, that no reasonable person would have believed that he was not free to disregard the request, and walk away. The court further ruled that even if Burzinski's failure to return the defendant's ticket and license turned the incident into an investigatory stop, the stop was justified by reasonable suspicion based on the facts in the officers' initial interview with Black.

Finally, the court concluded that Black consented to the search of his bag; that by the time Black sought to revoke that consent Burzinski had already seen the cocaine; and that Black's attempt to remove Kinsella's hand from the bag caused the cocaine to come into Kinsella's view as well.

II.

The primary issue raised on appeal is whether the defendant was unlawfully seized before the search of his travel bag. Analysis of this issue further breaks down into two questions: was the defendant seized, and if so at what point; and, if the defendant was seized, was there objective justification sufficient to create reasonable suspicion that the defendant was engaging in criminal activity.

A. Did a Seizure Occur, and, If So, When?

The issue of when a seizure has occurred is a somewhat unsettled one. As a preliminary matter, we note that the case law has developed three tiers or categories of police-citizen encounters. The first, an arrest, is characterized by highly intrusive or lengthy search or detention; the Fourth Amendment requires that such an arrest be justified by probable cause to believe that a person committed or is committing a crime. *See, e.g., Dunaway v. New York*, 442 U.S. 200 (1979); *Beck v. Ohio*, 379 U.S. 89 (1964). The second category, the investigatory stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning; this type of encounter is also considered a "seizure" sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *Terry v Ohio*, 392 U.S. 1 (1968). The third category of police-citizen encounter is that in which no

restraint of the liberty of the citizen is implicated, but the voluntary cooperation of the citizen is elicited through non-coercive questioning; this type of contact does not rise to the level of a seizure. *United States v. Mendenhall*, 446 U.S. 544, 553-55 (1980) (Stewart, J.) (with Rehnquist, J., concurring); *Terry*, 392 U.S. at 19. n.16

The proper test for determining whether a given police-citizen contact rises to the level of a Fourth Amendment seizure was the focus of inquiry in the recent case of *United States v. Mendenhall*, *supra*. In *Mendenhall*, two federal DEA agents observed the defendant arrive at the Detroit Airport from Los Angeles, and determined that her conduct was characteristic of drug couriers. After following Mendenhall briefly, the agents identified themselves and asked to see her identification and ticket. On observing that the names on the two items were not the same, the agents questioned Mendenhall on the discrepancy and on her stay in California. The agents returned her ticket and license, and asked her to accompany them to the DEA's airport office. The defendant did so, and consented to a search of her person in the office. Heroin was found, and Mendenhall was arrested.

A majority of the Court concluded that no constitutional violation had occurred. The Court could not, however, reach consensus on the rationale. Justice Stewart, in an opinion joined only by Justice Rehnquist, concluded

> that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the

incident, a reasonable person would have believed that he was not free to leave.

446 U.S. at 554. Justice Stewart determined that under the facts before the Court, no seizure of the defendant had occurred:

> The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See *Terry v. Ohio*, 392 U.S. at 31, 32-33 (Harlan, J., concurring). See also ALI, Model Code of Pre-Arraignment Procedure §110.1(1) and commentary, at 257-61 (1975). In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

446 U.S. at 555.

Justice Powell, joined by the Chief Justice and Justice Blackmun, concurred in the judgment, but declined to join in that portion of Justice Stewart's opinion which found that no seizure had occurred. While specifically noting that he did not necessarily disagree with that conclusion, 446 U.S. at 560 n.1., Justice Powell declined to reach the issue of whether a seizure had occurred on the ground that that question had not been decided below, but ruled that any seizure was justified by the requisite suspicion.

Several circuits have adopted Justice Stewart's "reasonable person" test for determining whether seizures have occurred in airport surveillance cases such as the one before us now. *See e.g., United States v. Viegas*, 639 F.2d 42, 44 (1st Cir. 1981), *cert. denied*, 451 U.S. 970; *United States v. Allen*, 644 F.2d 749 (9th Cir. 1980); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980); *see United States v. Jefferson*, 650 F.2d 854 (6th Cir. 1981). We are similarly persuaded that this is the appropriate standard under which the seizure question should be resolved. As long as a person remains at liberty to disregard a police officer's request for information, no constitutional interest is implicated. Imposition of an objective standard requiring the presence of circumstances which indicate that that freedom to disregard has been obumbrated properly provides a reliable basis on which the court may determine whether valuable liberty interests have been infringed, without hamstringing the ability of the police to engage in some modicum of legitimate contact with the citizenry.

Before determining whether the encounter between Black and the officers rose to the level of a seizure under this test, we point out that the question is a

highly factual one, heavily dependent on the circumstances of each case. *See Mendenhall*, 446 U.S. at 554. Our standard of review is accordingly limited to inquiry into whether the decision of the district court is clearly erroneous, and requires that particular deference be given to the district judge who had the opportunity to observe the testimony and demeanor of both the officers and the defendant. *United States v. Patino*, 649 F.2d 724, 728 (9th Cir. 1981) (affirming trial court's finding that a seizure had occurred).

In determining whether a given police-citizen encounter constitutes a seizure in the context of airport surveillance, courts have looked at a variety of factors. The inquiry has focused on three major areas: (1) the conduct of the police; (2) the person of the individual citizen; and (3) the physical surroundings of the encounter. In examining the conduct of the police officer, courts have sought to determine whether "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen such that he is not free to walk away." *United States v. Viegas*, 639 F.2d 42, 45 (1st Cir. 1981), *cert. denied*, 451 U.S. 970 (quoting *Terry*, 392 U.S. at 19 n.16). The district court here found that no physical force was used to detain the defendant. Although the defendant contended at the suppression hearing that he had in fact been "surrounded" by the two officers, and prevented from leaving, the trial court rejected that testimony, and found that nothing about the encounter was coercive, and specifically noted, after reviewing the defendant and the manner in which he testified, that the court did not believe that the defendant could reasonably have felt coerced.

An individual need not be held at gunpoint or in bonds, however, before a restraint will be found: "any restraint of movement will do." *United States v. Elmore*, 595 F.2d 1036, 1041 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980). Thus, if officers have intimidated an individual through the use of a show of authority sufficient to make it apparent that the individual is not free to ignore the officer and proceed on his way, a seizure will be found. The determination of precisely when an officer's polite request for an interview rises to the level of a show of authority sufficient to constitute an investigative stop is "not always an easy one," *Viegas*, 639 F.2d at 44, may be "extremely close" *Mendenhall*, 446 U.S. at 560 n.1 (Powell, J., concurring), and calls for a "refined judgment" by the trial court, *Elmore*, 595 F.2d at 1041-42 (quoting *United States v. Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978)). We are not persuaded that the findings of the district judge on this close question of fact are clearly erroneous. He noted that the officers were casually dressed, did not display any weapons, did not raise their voices above a conversational level, and did not threaten Black. We find no error with the district court's findings vis-a-vis the conduct of the officers and agree with its finding that Black's freedom was not restrained by an overbearing show of authority.

Courts have also looked to the characteristics of the defendant in seeking to determine whether even a facially innocuous encounter might, in the circumstances, have overborne the citizen's freedom to walk away. For example, in *United States v. Patino*, 649 F.2d 724 (9th cir. 1981), the court affirmed a trial court's finding that an individual had been restrained by a request for an interview when she had problems understanding

the English language, and was an alien who might therefore have felt a greater compulsion to comply with the request of the police. In contrast to *Patino*, the trial court here found the defendant, "an articulate, intelligent young man," and noted that he was a college graduate. We concur that the defendant was not so naive or vulnerable to coercion that special protection from police contacts was required by the Fourth Amendment.

The final element courts have examined in determining whether a police-citizen encounter was voluntary or coerced is the physical setting in which the encounter took place. For example, in *United States v. Lara*, 638 F.2d 892, 894, 899 (5th Cir. 1981), the court noted that the encounter took place in an area of the airport which was characterized as relatively private, and pointed out that the defendant might have felt isolated from others. Similarly, in *United States v. Jefferson*, 650 F.2d 854, 858 (6th Cir. 1981), the court found a seizure had occurred when the citizen was immediately hustled from the public concourse to a private office, where he was interrogated. In the instant case, the district court found that "[t]he incident took place entirely in a well-lit and spacious public concourse with other travelers present." 510 F. Supp. at 992. This is patently inconsistent with the contention that Black's liberty was restrained by a sort of quasi-imprisonment. Nor are we persuaded that the officers seized the defendant when they suggested moving to the side of the corridor to avoid the flow of traffic. This request, readily acquiesced to by the defendant, did not result in his isolation or restraint, and was therefore of no legal significance. *See United States v. Allen*, 644 F.2d 749, 751 n.3 (9th Cir. 1980).

We conclude, therefore, that the trial court correctly ruled that the officers' initial contact with Black, up to and including the point where Kinsella suggested they move to the side of the concourse, was lawful, and did not constitute a seizure triggering the protections of the Fourth Amendment. *Dunaway v. New York*, 442 U.S. 200 (1979), relied upon by the defendant to establish that probable cause was required for the initial contact is inapposite here. Dunaway was picked up in a police car, brought to police headquarters, given his *Miranda* warnings, and questioned in the station's interrogation room. This highly intrusive and lengthy detention falls into the first tier of Fourth Amendment analysis, and is clearly distinguishable from the facts of the instant case.

The defendant also contends that even if the initial encounter was valid, Black was seized for Fourth Amendment purposes when the officers took and kept his driver's license and airline ticket. Under our reasoning above, we believe it is clear that the mere request for and voluntary production of such documents does not constitute a seizure, but rather falls into the category of a non-coercive police-citizen encounter. As several courts have realized, however, the retaining of the documents beyond the interval required for the appropriate brief scrutiny, may constitute a "watershed point" in the seizure question. *United States v. Viegas*, 639 F.2d 42, 44 n.3 (1st Cir. 1981), *cert. denied*, 451 U.S. 970; *United States v. Elmore*, 595 F.2d 1036, 1042 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980); *see Mendenhall*, 446 U.S. at 570 n.3 (White, J., dissenting). The question whether a reasonable person would have felt free to leave when Kinsella handed his ticket and driver's license to another officer while kneeling to look into

the travel bag is extremely close. In *Elmore*, where a seizure was found, the agents did not merely hold on to the ticket; they actually carried it to the airline ticket counter, away from the physical presence and sight of the defendant. Here the ticket remained in plain view at all times. There is no intimation in the record that Kinsella handed the ticket to Burzinski in a manner that implied he was removing it from Black's grasp or otherwise prohibiting access to it. Rather the fair inference from the testimony is that Kinsella did so simply to free his hands for searching the travel bag, pursuant to Black's consent.

The trial court resolved the question whether the retention of the ticket constituted a search by finding that

> in light of all the circumstances, even if Burzinski's failure to immediately and independently return Black's ticket and driver's license turned what had been, up to this time, mere "personal intercourse" into an investigatory stop or detention, this stop was justified by what was now the clearly reasonable suspicion of the officers . . . .

510 F. Supp. at 993. If such reasonable suspicion was present, there would be no Fourth Amendment problem with retention of the documents even if that rises to the level of a seizure. *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *Mendenhall*, 446 U.S. at 560 (Powell, J., concurring); *Viegas*, 639 F.2d at 44. We therefore turn our attention to the question whether the officers had sufficient articulable facts to give rise to a reasonable suspicion

that Black had committed or was committing a crime at the time Kinsella handed the documents to Burzinski.

B. Was There Reasonable Suspicion Sufficient to Warrant Retention of the Defendant's Driver's License and Airline Ticket?

In *Reid v. Georgia*, 448 U.S. 438 (1980), the Supreme Court examined the circumstances surrounding a *"Terry"* stop of a suspected drug courier by DEA agents in the Atlanta airport, in order to determine whether they gave rise to a reasonable suspicion of criminal activity sufficient to justify the stop. The trial court had ruled that the defendant had been seized without the necessary "articulable suspicion." The appellate court reversed, concluding that because the defendant appeared to the agents to fit a "drug courier profile," there was reasonable suspicion. The drug courier characteristcs listed by the appellate court were

> (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.

448 U.S. at 441. The Supreme Court rejected these grounds as a sufficient basis for reasonable suspicion, and pointed out that

> only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Id.

Kinsella and Burzinski articulated the following grounds for their decision to make the initial contact with Black:

> (1) Black had arrived on a flight from Fort Lauderdale;
>
> (2) Black was the first passenger off the plane;
>
> (3) He exited the plane in a speedy fashion and was in a disoriented state;
>
> (4) He appeared to be nervous as he walked through the concourse and viewed the flight information screen.[1]

---

[1]The officers were not relying on the DEA drug courier profile discussed in *Reid* and *Mendenhall*, but rather on the basis of the experience of drug enforcement personnel at O'Hare. Although the homemade profile based on this experience was not highly formalized, there is some indication in the record that the officers relied not only on their personal experience, but on a "booklet" listing characteristics of drug couriers traveling through O'Hare.

Despite the Supreme Court's recognition that "a trained officer draws inferences and makes deductions . . . that might well elude an untrained person," *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see Mendenhall*, 446 U.S. at 563 (Powell, J., concurring) (quoting *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979)), it is clear that under the *Reid* standard, these factors alone would not justify a *Terry* stop.

In the instant case, however, the officers had several additional facts to consider at the earliest point at which a seizure could be said to have occurred, i.e., when Kinsella passed the documents on to Burzinski. There was the unexplained discrepancy between the names on the ticket and the driver's license; the substantial cash price of the first-class ticket, and the defendant's heightened nervousness (Burzinski testified that at this point Black was "shaking, visibly shaking, and acting very nervous"). Finally, there was the coconut story, implausible on its face, and highly inconsistent with Black's expensive first-class ticket. These additional factors, gleaned during the constitutionally permissible initial encounter, provided the officers with reasonable suspicion to detain Black further and seek his consent to search his travel bag. *United States v. Herbst*, 641 F.2d 1161, 1167 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 292; *United States v. Berd*, 634 F.2d 979, 986 (5th Cir. 1981); *United States v. Elmore*, 595 F.2d at 1041.

We are unmoved by the defendant's assertion that all of his actions and responses were consistent with wholly innocent behavior, and could not therefore give rise to reasonable suspicion without subjecting every airport passenger to potential police seizure. As other courts confronted with similar situations have noted,

"[i]t must be rare indeed that an officer observes behavior consistent *only* with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2d Cir. 1979), *quoted in United States v. Viegas*, 639 F.2d at 45. It is for that reason that the applicable standard in determining the propriety of a *Terry* stop is not whether the defendant's acts can be construed as innocent through the exercise of exegetical speculation, but rather whether they give rise to an articulable, reasonable suspicion of criminal activity. We conclude that in this case the trial court did not err in determining that even if the retention of the documents constituted a seizure, it was justified at that point by objective and articulable factors giving rise to a reasonable suspicion that a crime had been or was being committed. We need not determine with precision therefore whether such a seizure actually occurred on the facts of this case when Kinsella turned the license and ticket over to Burzinski, and now turn our attention to the officers' search of Black's travel bag.

III.

The defendant's final contention is that even if the seizure was not unreasonable and his consent to search his bag valid, he withdrew all consent to the search before the observation and seizure of the cocaine. He relies on *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977), for the proposition that consent to a search can be limited or withdrawn, and that such withdrawal must be honored by the police. We do not quarrel with that proposition as an abstract formulation of the law. It flies in the face of the facts found by the district court, however, to assert that consent was withdrawn in this case before the officers observed the cocaine.

Kinsella testified that subsequent to the grant of consent he reached into the bag, grasped a shirt and was about to remove it from the bag, when the defendant grabbed his arm, requested him to stop the search, and pulled his arm and the shirt out of the bag, whereupon the plastic bag of cocaine fell into plain view at the bottom of the bag. Burzinski testified that she was standing next to Kinsella and Black, who were kneeling next to the bag, and that she could see what appeared to be a bag of cocaine in the travel bag when Kinsella raised the shirt, shortly before Black attempted to pull Kinsella's hand from the bag. While Black testified that he had not pulled Kinsella's hand or the shirt from the bag, the court explicitly resolved whatever issue of fact the two accounts created against the defendant. It ruled that the discovery of the cocaine was the result of the defendant's initial consent, and his clumsy attempt to revoke that consent. We are not persuaded that these findings, based as they are on the demeanor and credibility of the witnesses, are clearly erroneous. In light of these facts, we hold the district court correctly applied the law of consent pursuant to the standards of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and of plain view, *United States v. Schire*, 586 F.2d 15 (7th Cir. 1978); *United States v. Cooks*, 493 F.2d 668 (7th Cir. 1974).

In accordance with the foregoing reasons, the judgment of the district court is

AFFIRMED.

SWYGERT, *Senior Circuit Judge*, dissenting. The case presents two crucial questions. First, when was the defendant Black seized within the meaning of the Fourth Amendment; and, second, at that point, did the police know "specific and articulable facts" sufficient to give rise to a reasonable belief that Black had committed a crime? *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). I believe that the majority has incorrectly analyzed both issues.

I make two preliminary observations. First, I note that the Supreme Court has never definitely articulated the concept of a Fourth Amendment seizure. The majority here adopts Justice Stewart's *Mendenhall*-test that a person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Only two Justices in *Mendenhall* explicitly accepted that test. An overly-restrictive definition of a seizure isolates police-citizen contacts from constitutional safeguards by removing them from judicial scrutiny. It, therefore, eliminates the only effective deterrent to police misconduct. *Terry v. Ohio*, 392 U.S. 1, 12 (1968). Nonetheless, even accepting the *Mendenhall* standard, I believe that the majority incorrectly analyzes the seizure issue.

Second, the majority is incorrect in using the "clearly erroneous" standard of review. The majority employs this standard of review because it believes that whether the encounter between the police and Black amounted to a seizure is a factual matter. Majority opinion at 11. The factual findings, however, are not in dispute. The only issue is whether these facts constitute a Fourth

Amendment seizure. This is a question of law and the standard of review, therefore, is not clearly erroneous. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *Murphy v. Turner*, 426 F.2d 422, 423 (10th Cir. 1970); 2 Fed. Proc., L. Ed. §3:652. The court's use of the incorrect standard of review contributes crucially to its erroneous result. The majority admits that it is a close question whether the initial contact between the police and Black was a seizure. Majority opinion at 13. The majority defers to the district court's legal conclusion because it finds no clear error in the factual findings. But the issue is a legal one and so the deference is inappropriate.

I

The majority holds that the initial encounter between the police and Black was neither an arrest nor an investigative stop. The police's conduct, therefore, is completely outside the reach of the Fourth Amendment and is not open to judicial scrutiny. I believe that a realistic analysis of the facts of this case cannot support this position.

Black left the plane, walked to the flight information screen, and then walked to another gate and sat down to wait for his connecting flight. After five minutes he got up to go to the washroom. Two people stopped him, identified themselves as Chicago police officers, and said that they wanted to ask him some questions. I believe that a reasonable person would not think that under these circumstances he could freely ignore the police and walk away. Police encounters that involve investigative questioning that focuses on the person being stopped are inherently coercive. Police are authority

figures. A person naturally feels compelled to stay put when the police stop him and say that they want to ask him some questions that involve him. The situation would have been quite different if the police were not investigating Black or were simply engaged in ordinary conversation. Here it is undisputed that the police stopped Black specifically to investigate him. I think it is clear that Black was seized under the Fourth Amendment. *See Brown v. Texas*, 443 U.S. 47, 50 (1979); *United States v. Palmer*, 603 F.2d 1286, 1288 (8th Cir. 1979).

The majority contends that Black was an intelligent and well educated person and would not be coerced in this situation. I agree that a defendant's lack of education or inability to speak English requires special sensitivity. It does not follow, as the majority seems to conclude, that college graduates are fair game for police interrogation without Fourth Amendment protections. The majority also notes that the incident took place in a well-lighted and spacious public concourse with other travelers present. I do not find this fact at all persuasive. O'Hare International Airport is neither a hospitable nor a comfortable environment. Being stopped there by police hardly diminishes the coercive atmosphere; if anything, it increases it.

The majority admits that prior to the initial encounter the police lacked justification for an investigative stop. Majority opinion at 18. Because I believe that the initial encounter was a seizure, the search that followed was illegal and its fruit should be suppressed.

II

Even if the initial contact were not a seizure, I still cannot accept the result. The majority admits that at a certain point the police's encounter with Black became a seizu . ; they never say, however, exactly when this seizure occurred. They do contend that, whenever it occurred, it was justified. I disagree.

The majority's unwillingness to state exactly when the seizure occurred produces its incorrect result. A court must determine when a seizure occurred because it is at that point that the court must evaluate the police officer's knowledge to see whether the seizure was justified. Because the majority never directly answers the seizure question, it errs on the issue of justification.

I think that it is beyond doubt that Black was seized when the police officers took his driver's license and airline ticket. I find entirely fanciful the majority's statement that whether a reasonable person would feel free to leave under these circumstances is "extremely close." How could Black reasonably feel free to leave when the police had in their possession his airline ticket and his driver's license? Where was he to go? How was he to get there? He could not get on a plane, and he could not rent a car. He had just arrived from another city. He was alone in a large international airport, and the police had taken his travel documents. The issue is not at all close. When the officers took Black's travel documents, he was seized under the Fourth Amendment. *See Brown v. Texas*, 443 U.S. 47, 50 (1979); *United States v. Palmer*, 603 F.2d 1286, 1288 (8th Cir. 1979).

The crucial question, therefore, is whether at that point the police had knowledge of specific and articulable facts that gave rise to a reasonable belief that Black had committed a crime. *Brown v. Texas*, 443 U.S. 47, 51 (1979); *United States v. Brigoni-Ponce*, 422 U.S. 873, 881-82 (1975); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). What specific and articulable facts did the police know? Did these facts meet the standard for investigative stops?

The majority states that the police knew that: (1) Black was the first passenger off a plane that had arrived from Ft. Lauderdale, (2) Black exited the plane speedily, and (3) Black appeared disoriented and nervous. These facts fail to meet the standard for investigative stops. It is a logical truth that every plane from Ft. Lauderdale will have a first person leave it. This fact lacks specificity and carries no weight. ("The demand for specificity . . . is the central teaching of this court's Fourth Amendment jurisprudence." 392 U.S. at 21, n.18.) The judgment of Black's psychological state is entirely subjective. A reviewing court must, of course, give due consideration to inferences an experienced agent reasonably draws from his observations. *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979). Nonetheless, the mere fact that an officer is experienced does not turn his suspicions into specific and articulable facts. Suspicions justify continued surveillance; they do not justify stopping and seizing citizens. *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2d Cir. 1980); *United States v. Price*, 599 F.2d 494, 500 n.7 (2d Cir. 1979).

Indeed, the majority admits that the foregoing facts would not justify the seizure of Black. It asserts, however, that the police knew three additional facts

that justified the seizure. Majority opinion at 18-19. This assertion is incorrect because the police obtained the knowledge of these facts *after* Black was seized. This illustrates the critical importance of determining exactly when the seizure took place. The police officer's knowledge must be evaluated at that point. Knowledge acquired after a seizure has occurred cannot be used *a posteriori* to justify it. *See Beck v. Ohio*, 379 U.S. 89, 96 (1964). *Cf. Bumper v. State of North Carolina*, 391 U.S. 543, 548 n.10 (1968) (search not justified by what it turns up).

In *Reid v. Georgia*, 448 U.S. 438 (1980), the defendant arrived at the Atlanta airport early in the morning from Ft. Lauderdale (the same city from which Black arrived in Chicago). He left the plane alone. He appeared nervous and to be concealing that he was traveling with a companion. His only luggage was a shoulder bag. He looked backwards several times in the direction of the second man. The police approached him, identified themselves as agents, and asked to see his airline tickets and identification. The Court held, as a matter of law, that the agents could not have reasonably suspected the defendant of criminal activity on the basis of these observations. 448 U.S. at 441. I believe that *Reid* is dispositive of our case. As a matter of law, the police lacked knowledge of specific and articulable facts about Black that justified a reasonable belief that he had committed a crime. The agent's beliefs were mere suspicions and "too slender a reed to support the seizure in this case." *Id.*

Cases from other circuits support this analysis. In *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2d Cir. 1980), the defendants arrived from a source city,

appeared nervous, and travelled separately in the airport although they had talked to each other when deplaning. The court held that the facts "strike us as wholly insufficient to constitute 'specific and articulable' facts supporting a reasonable suspicion that they were involved in drug trafficking." 615 F.2d at 36. The court noted that, "There must be other *objective* facts which when viewed in conjunction with nervous behavior and arrival from a source city raise the complex of conduct to a level justifying reasonable suspicion of criminal activity." *Id.* (emphasis added). In *United States v. Jefferson*, 650 F.2d 854 (6th Cir. 1981), the defendant arrived from a source city, walked quickly through the terminal, appeared extremely nervous, matched a tip from an informant, and did not claim his luggage until he was picked up by someone. The court held that these facts did not justify an investigative stop. 650 F.2d at 856-57. *See also Brown v. Texas*, 443 U.S. 47 (1979); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

When the officers stopped Black, questioned him, and took his travel documents, he was seized. At that point the police lacked knowledge of specific and articulable facts that justified the seizure. Because the seizure was illegal, the fruits of the search that followed should be suppressed.

I dissent.

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Teste:

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No. 81-2239

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In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD G. BLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was unlawfully seized during his encounter with airport police officers.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 675 F.2d 129. The opinion of the district court is reported at 510 F. Supp. 989.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1982. The petition for a writ of certiorari was filed on June 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After denial of his pretrial motion to suppress physical evidence and a bench trial on stipulated facts, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). The court found that petitioner would benefit from consideration under the Federal Youth Correction Act, suspended the imposition of sentence, and placed petitioner on five years' probation. A divided panel of the court of appeals affirmed.

1. The evidence below was adduced at a pretrial hearing on petitioner's motion to suppress[1] and has been set out in detail in the opinions below (see Pet. App. 2–6; 510 F. Supp. at 990–992). Briefly, it showed that on May 14, 1980, two experienced Chicago police officers, Burzinski and Kinsella, were assigned to assist in the federal Drug Enforcement Administration's airport drug courier surveillance program and were observing passengers arriving at O'Hare International Airport on a flight from the Miami-Fort Lauderdale area (Pet. App. 2–3; 510 F. Supp. at 990). The officers noticed petitioner, the first person to disembark from the flight. He was carrying a black airline travel bag and appeared nervous and disoriented to the officers as he rapidly exited the plane. The officers decided to follow him down the concourse. As petitioner neared the terminal he again appeared to be unsure of his footing, looked back over his shoulder, and stumbled (Pet. App. 3; 510 F. Supp. at 991). Petitioner stopped in the terminal at the intersection of two concourses and began looking around and behind continually for several minutes, in a manner that suggested to Burzinski that he was not looking for anyone in particular but rather was surveying the people in the area. Petitioner then proceeded to another gate and sat down in the waiting area there without first checking in, even though the check-in counter was staffed at the time. After sitting for about five minutes, petitioner picked up his bag and walked back to the concourse.

At this point the officers, who were dressed in plain clothes, approached petitioner, identified themselves, and asked if they could speak with him. Petitioner

[1] After his motion was denied, petitioner stipulated that his guilt or innocence could be determined based upon the testimony adduced at the suppression hearing together with the lab report on the seized substance. 510 F. Supp. at 990.

agreed to speak with them. Officer Kinsella inquired whether petitioner had identification and an airline ticket. In response, petitioner produced a Hawaii driver's license and a one-way ticket to Honolulu. The first-class ticket, which had been purchased for cash in Florida, was made out in a name different from that on the driver's license. Petitioner simply shrugged his shoulders in response to the officers' inquiry concerning that discrepancy, but when asked what he had been doing in Florida he told them that he had been surfing in Florida for three months and that he had harvested coconuts to earn his plane fare back to Hawaii (Pet. App. 3–5; 510 F. Supp. at 991). Officer Kinsella continued to hold petitioner's ticket and license, but held them in front of him and did not remove them from his presence.

At Officer Kinsella's suggestion, the three moved to the side of the concourse where petitioner had initially been stopped, so as to avoid disruption of traffic. Petitioner by this time appeared to be very nervous. One of the officers asked petitioner if he could search the black airline bag, cautioning that petitioner was not obliged to consent. Petitioner consented to the search, however, and immediately commenced emptying the bag himself. Handing petitioner's ticket and license to Burzinski, Officer Kinsella continued the search. He removed a shaving kit from the bag, and then reached in for a shirt. When he grasped the shirt, however, Officer Kinsella felt a firmer object within and Officer Burzinski saw a clear plastic bag, containing a white powder, wrapped in the folds of the shirt. At that moment petitioner seized Officer Kinsella's hand and told him not to search any further. As petitioner pulled the officer's hand out of the bag, the plastic bag containing the powder fell free of the shirt into the bag and was visible to Kinsella, who placed petitioner under arrest (Pet. App. 5; 510 F. Supp. at 991–992).

2. The district court made detailed findings. The court found that at no point during the encounter did either officer display a weapon or raise his voice or otherwise threaten or coerce petitioner. The duration of the stop was not longer than a few minutes, and nothing in the officers' conduct or the circumstances could have indicated to a reasonable person that he was not free to go when initially approached, the court determined. Finally, the district court found that petitioner, who was 24 years old, was an articulate and intelligent college graduate (510 F. Supp. at 992). The district court concluded (*id.* at 992–993) that petitioner was not "seized" when the officers first approached him.[2] The court additionally concluded that even if the encounter was converted into a seizure when the officers failed to return petitioner's ticket and identification, a seizure of his person at that point was justified by reasonable suspicion derived in part from the initial phase of the interview with petitioner (*id.* at 993). The court then held that petitioner voluntarily consented to the search of his bag, and that by the time he withdrew his consent the cocaine was in plain view.

3. The court of appeals affirmed petitioner's conviction. It agreed with the lower court's factual findings that petitioner's freedom "was not restrained by an overbearing show of authority" (Pet. App. 12); that petitioner was "not so naive or vulnerable to coercion that special protection from police contacts was required by the Fourth Amendment" (Pet. App. 13); and that petitioner was not coerced by the physical setting. The court accordingly concluded that neither the officers' initial approach to petitioner nor the phase of the ensuing encounter prior to the time Kinsella handed pe-

[2] The court held in the alternative that even if the initial approach were regarded as a seizure, it was supported by reasonable suspicion (510 F. Supp. at 993 n.1).

titioner's ticket and license to Burzinski was a Fourth Amendment "seizure" (Pet. App. 14).[3] The court of appeals concluded that the officers' continued retention of petitioner's license and ticket was supported by their "clearly reasonable suspicion" based upon sufficient articulable facts (Pet. App. 15–19). These included the facts that originally drew the officers' attention to petitioner, as well as his heightened nervousness as the encounter developed, petitioner's unexplained use of a false name, the cash purchase of the first class ticket, and the inconsistency between petitioner's claim of straitened circumstances and his use of a first class ticket. Finally, the court affirmed the district court's determination that petitioner voluntarily consented to the search of his bag and that the cocaine was in plain view when the officers found and seized it (Pet. App. 20).

Judge Swygert dissented. He rejected the majority's conclusion that petitioner was not "seized" when the officers approached him in the airport, finding instead that a police contact with an individual for questioning is inherently coercive whenever the individual is suspected of wrongdoing (Pet. App. 22–23). He also concluded that the officers' initial request for petitioner's license and ticket effected a seizure that was unsupported by reasonable and articulable suspicion and was accordingly impermissible under the Fourth Amendment (Pet. App. 24–26).

ARGUMENT

1. The question presented by the petition (see Pet. i, 7) is whether petitioner was seized at any time during his encounter with the Chicago police officers. But there is no occasion for this Court to consider that question because both courts below concluded that even if

[3] The court found it unnecessary to decide whether the latter event converted the consensual contact into an investigative seizure (Pet. App. 19).

the encounter became a seizure at the point Officer Kinsella handed petitioner's ticket and driver's license to Officer Burzinski (rather than returning them to petitioner) in order to free his hands to carry out the consent search of petitioner's bag, reasonable suspicion sufficient to support investigative detention of petitioner had by then arisen. Neither petitioner nor the dissenting member of the panel disputes the court of appeals' conclusion that reasonable suspicion supporting a stop existed at this juncture. Accordingly, the broadly framed question tendered for review by petitioner simply is not presented on the record of this case.

Moreover, petitioner does not appear to dispute the court of appeals' conclusion that the initial approach by the officers to him was a consensual contact, and rightly so. This Court has recognized that not every contact between a citizen and a police officer constitutes a seizure within the meaning of the Fourth Amendment. On the contrary, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); see also *id.* at 32–33 (Harlan, J., concurring; *id.* at 34 (White, J., concurring); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968). As Justice Stewart explained in his opinion in *United States* v. *Mendenhall*, 446 U.S. 544, 554–555 (1980) (footnotes omitted):

> [A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of

> voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. [4]

Like the Seventh Circuit in this case, the courts of appeals have uniformly adopted the standard endorsed by Justices Stewart and Rehnquist for determining whether or not a seizure has taken place,[5] and petitioner does not quarrel with that standard; rather, he invokes and relies upon it (Pet. 7). Accordingly, no question as to the fundamental principles that distinguish consensual police-citizen encounters from seizures is presented here.[6]

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[4] In *Mendenhall*, a majority of the Court found no occasion to decide whether a citizen-police contact constitutes a seizure within the meaning of the Fourth Amendment in the absence of police conduct that would cause a reasonable person to believe that he was not free to leave. See 446 U.S. at 560 (opinion of Powell, J.); *id.* at 568–571 (White, J., dissenting).

[5] See *United States* v. *Moore*, 675 F.2d 802, 807–808 (6th Cir. 1982); *United States* v. *Elsoffer*, 671 F.2d 1294, 1297 (11th Cir. 1982); *Gomez* v. *Turner*, 672 F.2d 134, 140–141 (D.C. Cir. 1982); *United States* v. *Berry*, 670 F.2d 583, 595 (5th Cir. 1982) (en banc); *United States* v. *West*, 651 F.2d 71, 72 (1st Cir. 1981), petition for cert. pending, No. 81–307 (filed Aug. 14, 1981); *United States* v. *Patino*, 649 F.2d 724, 726, 727 (9th Cir. 1981); *United States* v. *Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *Cuevas-Ortega* v. *INS*, 588 F.2d 1274, 1277 (9th Cir. 1979); *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); see also *United States* v. *MacDonald*, 670 F.2d 910, 912 (10th Cir. 1982); *United States* v. *Harrison*, 667 F.2d 1158, 1161 (4th Cir. 1982), cert. denied, No. 81–6302 (June 14, 1982); *United States* v. *Price*, 599 F.2d 494, 498 (2d Cir. 1979); *State* v. *Reid*, 247 Ga. 445, 276 S.E.2d 617, 621 (1981), cert. denied, No. 81–180 (Oct. 5, 1981), on remand from 448 U.S. 438 (1980).

[6] This case is accordingly unlike *West* v. *United States* petition for cert. pending, No. 81–307 (filed Aug. 14, 1981).

2. The only question presented for consideration in this case, accordingly, is the highly fact-bound issue whether the court of appeals correctly applied the standard that distinguishes seizures from encounters not subject to the Fourth Amendment to the facts of this case.[7] Petitioner's only specific claim is that the court of appeals' conclusion that there was no seizure prior to the transfer of his ticket and identification from Officer Kinsella to Officer Burzinski conflicts with decisions of the Fifth and Eleventh Circuits, which, he claims, require immediate return of identification documents obtained from a traveller. No conflict warranting this Court's review exists, however.

Petitioner does not appear to claim that he was seized when he first produced his identification and airline ticket; he does not challenge the district court's determination (510 F. Supp. at 993) that he produced these "freely and voluntarily" when asked by Officer Kinsella if he could see these items. Citing *United States* v. *Berry*, 670 F.2d 583 (5th Cir. 1982), and *United States* v. *Elsoffer*, 671 F.2d 1294 (11th Cir. 1982), however, he asserts (Pet. 10–11) that Officer

[7] Thus, contrary to petitioner's contention (Pet. 7, 11), this case does not present any question necessarily to be considered by the Court in *Florida* v. *Royer*, cert. granted, No. 80–2146 (Nov. 30, 1981). There the only question decided by the lower court was that a seizure of the defendant ripened into an arrest unsupported by probable cause. *Royer* v. *State*, 389 So.2d 1007, 1018–1019 (Fla. Dist. Ct. App. 1980). The Florida appellate court expressly declined to decide whether the initial contact between Royer and police officers constituted a Fourth Amendment seizure, *id.* at 1018 n.8, or whether there were sufficient grounds to justify an investigative detention of Royer either at the outset or at some later juncture. *Id.* at 1017 n.6, 1019 n.11. It is thus far from certain that the Court's decision in *Royer* will shed light upon the question presented here. Accordingly, we believe it is unnecessary to hold this case pending a decision in *Royer*.

Kinsella's failure to return his ticket and driver's license immediately effected a seizure. Petitioner misreads the holdings of *Berry* and *Elsoffer*. In *Berry*, the en banc Fifth Circuit adopted the standard enunciated by Justice Stewart in *Mendenhall* for distinguishing seizures from mere contacts and recognized that a request for production of identification or a ticket does not, in itself, effect a seizure. 670 F.2d at 595, 597, 607 & n.26. Petitioner's suggestion (Pet. 10) that the *Berry* court determined that a seizure had occurred there immediately upon defendant Berry's compliance with an agent's request for identification seriously mistakes the holding of that case. The actual holding (670 F.2d at 603) was simply that there had been no seizure prior to or through the point at which Berry produced a driver's license and admitted his association with another traveller, thereby acknowledging that he had previously lied to the agent about his identity and association with the other traveller. The Court did not decide whether the encounter was thereafter a seizure, because it concluded that reasonable suspicion had by then arisen (*id.* at 603–604). The Court rejected any suggestion that the request for production of Berry's airline tickets or his license effected a seizure. Most significantly, the information identified by the court of appeals to support the conclusion that any seizure was justified included the information garnered from inspection of Berry's ticket and license.

To be sure, the court in *Berry* suggested (670 F.2d at 597, 603 n.26) that retention of a traveller's ticket for an undue period of time, or removal of the ticket from the traveller's presence, would tend to suggest that a seizure had occurred. And in *United States* v. *Elsoffer*, *supra*, 671 F.2d at 1297, the Court stated that retention of a ticket for an undue time during interrogation did convert the encounter into a seizure.[8] Yet neither of

[8] Each of these statements is technically dictum, for in each case the court held that reasonable suspicion had arisen by the time any seizure was said to occur.

these decisions suggests that immediate return of tickets or identification is required in every case. Rather, the rule suggested is simply that any retention must not assume a form or duration that conveys the reasonable belief that the individual could not upon request secure return of his ticket and identification and proceed on his way.

In the circumstances of this case the court of appeals' conclusion that no seizure was effected prior to the transfer of the ticket and license to Officer Burzinski is clearly correct. At no time did Officer Kinsella remove the tickets from petitioner's immediate presence or remove them from his view. Compare *United States* v. *Elmore*, 595 F.2d 1036, 1042 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980). And unlike the retention of tickets during interrogation disapproved in *Elsoffer* (see 671 F.2d at 1295–1296), the questioning here was extremely brief and related entirely to the tickets and petitioner's travel (see Pet. App. 4–5). Accordingly, even if the *Elsoffer* dictum is sound, that case is distinguishable. In short, nothing about Officer Kinsella's conduct would suggest that petitioner was being forcibly detained at that point.[9]

In any event, contrary to petitioner's suggestion, the decision below is fully consistent with the decisions in *Berry* and *Elsoffer*. Here, as in *Berry*, reasonable suspicion supporting investigative detention came into being immediately upon initial inspection of the proffered identification.[10] Officer Kinsella was immediately made aware of the discrepancy in names upon petitioner's ticket and driver's license and that petitioner had pur-

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[9] Indeed, as the court of appeals recognized (Pet. App. 14–15), it is by no means clear given the circumstances that the subsequent transfer of the ticket and license to Officer Burzinski altered the situation.

[10] In *Elsoffer* reasonable suspicion arose prior to that time.

chased an expensive first-class ticket with cash. Coupled with petitioner's extreme nervousness and the peculiar behavior that originally drew the officers' attention this sufficed to justify detention and questioning of petitioner. Thus there is no occasion for this Court to consider petitioner's central contention that, in the absence of reasonable suspicion, Officer Kinsella was required to return his ticket and license immediately upon glancing at them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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